STATE OF MICHIGAN

IN THE SUPREME COURT

OK

TOMO PERKOVIC,

Plaintiff-Appellee,

v

AARON WILLIAM BROWN,

Defendant-Appellant.

Supreme Court
No.

Court of Appeals
No. 235699

Opn 11/15/02
Reh 1/13/02

Macomb County Circuit
Court No. 00-004399-NI

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NOTICE OF HEARING

DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

ORDER BEING APPEALED AND RELIEF SOUGHT

This is an automobile negligence case brought by Plaintiff Tomo Perkovic against Defendant Aaron Brown.

Plaintiff-Appellee Perkovic lost his case in the trial court when Macomb Circuit Judge Deborah Servitto, by Opinion and Order dated July 5, 2001 (Appendix C), granted Defendant Brown's motion for summary disposition pursuant to MCR 2.116(C)(10) [no genuine material dispute of fact]. The court had taken the motion under advisement so that she could review Plaintiff's entire deposition (Appendix B: T. 9). The court then concluded, in her 5-page Opinion and Order, that Plaintiff's case against Defendant was based not on fact or evidence but purely on assumption or speculation – i.e., there was no evidence of Defendant-negligence.

However, on appeal of right by Plaintiff, the Court of Appeals reversed the trial court's decision and remanded this case for further trial court proceedings. The Court of Appeals decided the appeal by "summary panel," without oral argument or full hearing, in an unpublished 2-page per curiam opinion dated November 15, 2002 (see Appendix E). The Court of Appeals then denied Defendant's timely motion for rehearing, by order dated January 13, 2003 (see Appendix F).

Defendant-Appellant respectfully submits, and will demonstrate infra, that the opinion of the Court of Appeals in this matter: is clearly erroneous, both factually and legally; is in explicit conflict with the established standard of review applicable to MCR

2.116(C)(10) summary disposition motions/orders as set forth in numerous appellate decisions and clarified in this Court's benchmark decision in Maiden v Rozwood, 461 Mich 109, 120-121 (1999); and manifestly unfairly reverses a perfectly appropriate grant of C-10 summary disposition to Defendant. This means that this case is worthy of this Court's review and relief, per MCR 7.302(B)(5).

In a nutshell, Defendant will show, infra, that the Court of Appeals opinion in this case features two very obvious and very serious outcome-determinative mistakes by the Court.

First of all, directly contrary to the trial judge's careful review and analysis of Plaintiff's actual deposition testimony, the Court of Appeals opinion found evidence of a "red" light at the intersection and at the time when Plaintiff turned left in front of and was struck by the oncoming Defendant. Plaintiff admitted at his deposition that, when he last saw the light, it was yellow – he never saw a red light. As admitted by Plaintiff and as found by the trial court, there was no evidence of a red light and therefore no evidence to support the allegation that Defendant ran the red light.

Secondly, and more importantly, the Court of Appeals opinion reversed the trial court with a pivotal paragraph that must rank as one of the most plainly erroneous statements of law that this Court is likely to ever see. After specifically finding that the evidence showed that "plaintiff was partially at fault for the accident" (Appendix E: CA Opinion, p. 2; emphasis added), the Court of Appeals then reversed the trial court's grant

of summary disposition to Defendant because the Court of Appeals could not find any evidence on this record to show that Defendant was negligent:

> "Whether defendant was equally negligent cannot be determined on this record. Whether defendant also violated § 612(1)(b) cannot be determined because there is no evidence to show that he was so close to the intersection that he could not stop safely. Even though defendant had the right of way and was not required to anticipate plaintiff's negligence or to have his vehicle under such control as to be able to avoid a collision with a car coming illegally into his path, *McGuire v Rabaut*, 354 Mich 230, 234, 236; 92 NW2d 299 (1958), he was not absolved of the duty to drive with due care for the safety of others and was still required to exercise due care under the circumstances. *Placek v Sterling Heights*, 405 Mich 638, 669-670; 275 NW2d 511 (1979). Thus, once it became clear that plaintiff 'was going to challenge or obstruct his right-of-way,' he had a duty to try to avoid a collision. *McGuire*, *supra* at 236. Whether he was negligent in failing to do so cannot be determined due to the lack of evidence. Therefore, the trial court erred in ruling that defendant was entitled to judgment as a matter of law."

(Appendix E: CA Opinion, p. 2; emphasis added).

The above-quoted holding states boldly, explicitly, and three times (no chance of being a typo), that the Court of Appeals is reversing the trial court's grant of summary disposition to Defendant because there is no evidence on this record of Defendant-negligence. Defendant agrees. There is no evidence of Defendant-negligence. That is why the trial court granted summary disposition to Defendant. That means that Defendant wins. . .

In light of these two errors, and especially the embarrassingly plain and repeated

error with regard to the misapplication of the standard of summary disposition review, Defendant asked for rehearing – but got nowhere (Appendix F).

WHEREFORE, for all of the reasons touched on supra, and detailed infra, Defendant-Appellant Aaron Brown requests that this Honorable Court, in lieu of granting leave to appeal, peremptorily reverse the Court of Appeals' decision (Appendices E, F) and reinstate the trial court's opinion and order (Appendix C) that granted summary disposition to Defendant.

In the alternative, Defendant requests that this Court grant leave to appeal the issue raised herein.

Respectfully submitted,

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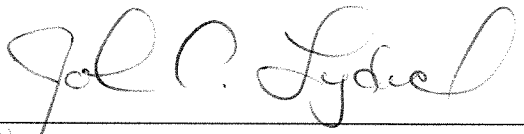

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Defendant-Appellant answers, "Yes."

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Procedural History

This is an automobile negligence action that was brought by Plaintiff Tomo Perkovic against Defendant Aaron Brown by Complaint filed with the Macomb County Circuit Court on October 25, 2000 (Appendix D: Circuit Court Docket Entries; Appendix C, p. 1). Defendant filed his Answer on December 4, 2000 (Appendix D).

Defendant filed a motion for summary disposition on April 16, 2001 (Appendix D). Plaintiff's answer to the motion was filed on May 10, 2001 (Appendix D).

Defendant's motion for summary disposition was heard by Macomb Circuit Judge Deborah Servitto on May 21, 2001 (Appendix D; see attached copy of hearing transcript – Appendix B). The court heard the arguments of both parties and engaged both counsel in questioning regarding the facts of the case. When Plaintiff's counsel disputed the trial court's understanding of Plaintiff's deposition testimony (Appendix B, pp. 7-9), which understanding was admittedly based on deposition "excerpts" only (Appendix B, p. 9; emphasis added), the court concluded the hearing by stating that the court was taking the matter under advisement and that the court would be reading "the complete [Plaintiff's] dep" (Appendix B, p. 9; emphasis added; see also Appendix A, the complete deposition of Plaintiff Perkovic).

Approximately 6 weeks later, on July 5, 2001, the court issued its decision (Appendix D: Docket Entries). In a 6-page "Opinion and Order" (Appendix C), the court

granted Defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) and dismissed Plaintiff's Complaint (Appendix C, p. 5).

The court specifically held that, with regard to Plaintiff's negligence allegations "that Defendant was speeding and ran a red light," the testimony in that regard "has apparently been quoted out of context" because Plaintiff merely "assumed" that (Appendix C, p. 4). The court concluded that there was no evidence to support Plaintiff's allegations of Defendant-negligence. The court further concluded that "the record evidence [i.e., of Plaintiff turning left on a yellow light in front of Defendant and without ever seeing Defendant] would only permit reasonable minds to conclude plaintiff was more than 50% at fault in causing the accident" (Appendix C, p. 5), thereby subjecting Plaintiff to disqualification from damages and dismissal of his suit pursuant to MCL 500.3135(2)(b) [Appendix C, pp. 3-4].

From the summary judgment of the trial court in favor of Defendant, Plaintiff appealed of right to the Court of Appeals.

The Court of Appeals heard and decided this case by "summary panel," without oral argument, pursuant to MCR 7.214(E) (Appendix E, p. 1). In a unanimous, unpublished, 2-page, per curiam opinion dated November 15, 2002 (Appendix E), the Court of Appeals reversed the trial court's decision and remanded this case for further trial court proceedings.

Defendant timely moved for rehearing, but Defendant's motion was denied by

Court of Appeals order dated January 13, 2003 (Appendix F).

From the decision of the Court of Appeals (Appendices E, F), which reversed the trial court's decision in this matter (Appendix C), Defendant submits this Application for Leave to Appeal.

Pertinent Facts

This case arises out of a 2-car motor vehicle accident that occurred on November 5, 1999, at approximately 5:00 p.m., at the intersection of Saal Road and 19 Mile Road in Sterling Heights, Michigan (Appendix A, pp. 7, 13, 14, 16, 27; Appendix B, p. 4; Appendix C, p. 1; Defendant's Motion for Summary Disposition, ¶¶ 1-2).

Plaintiff Tomo Perkovic was proceeding southbound on Saal, and was in the process of turning left (east) onto 19 Mile Road, when he was struck by Aaron Brown's vehicle that was proceeding northbound on Saal through the intersection (Appendix A, pp. 16, 17, 20, 23-24; Appendix B, p. 4; Appendix C, p. 1).

The accident-intersection was controlled by a traffic light. The light had no left-turn arrow. (Appendix A, pp. 16-17; Appendix B, p. 4).

On the green light, Plaintiff had stopped in the left-turn lane and was waiting for the light to turn yellow and for everything to get clear so he could turn (Appendix A, pp. 17, 18, 19, 20, 26, 34; Appendix B, p. 4; Appendix C, p. 3).

Plaintiff testified that, when the light turned yellow, he turned left, whereupon he was struck by Defendant (Appendix A, pp. 17, 18, 19, 20, 26; Appendix B, p. 5;

Appendix C, p. 3).

At his deposition, Plaintiff was asked about his (previously pled) allegations that Defendant had caused the accident by driving at an excessive rate of speed and by running the red light (Appendix A, pp. 17-18, 30, 31, 37; Appendix C, p. 1). When examined about this, Plaintiff indicated that he believed or guessed (i.e., speculated) that this was the case:

> "Q. You mentioned something earlier about my client's speed and you were guessing at something, but since you never saw my client's vehicle you have no idea how fast he was going or how slow he was going, correct?
>
> A. I have no idea. Right."

(Appendix A, p. 30; see also Appendix A, p. 36, and Appendix C, p. 4).

Plaintiff repeatedly admitted that he never saw Defendant prior to the collision, and therefore he couldn't know or estimate how fast Defendant was going:

> "Q. So you're in the intersection, you saw that light had turned yellow, other cars had turned in front of you.
>
> Did you see my client's vehicle going north on Saal?
>
> A. I don't think so. I didn't.
>
> Q. Did you ever see my client's vehicle at any time before the two vehicles collided?
>
> A. I didn't."

(Appendix A, p. 19).

"Q. You never saw my client's vehicle before the collision and you started to turn left and were moving in your turn when the impact occurred?

A. Yes."

(Appendix A, p. 20).

"Q. Do you know where my client's car, what road it was on or where it was coming from?

I assume you don't if you never saw it.

A. I really don't know.

Q. Did you actually look down Saal Road to see if there was any northbound traffic coming?

A. I didn't see Mr. Aaron at all."

(Appendix A, p. 26).

"Q. You mentioned something earlier about my client's speed and you were guessing at something, but since you never saw my client's vehicle you have no idea how fast he was going or how slow he was going, correct?

A. I have no idea. Right."

(Appendix A, p. 30).

"Q. Your answers to interrogatories suggest my client may have been speeding when you say an excessive speed, but you've already told me you never saw him.

You don't know at all how fast or slow

my client was going?

A. That's correct."

(Appendix A, p. 37). (See also Appendix B, p. 5, and Appendix C, p. 4).

Plaintiff further acknowledged that he never saw Defendant even though it was daylight and clear out, his vision was fine, and there were no obstructions (Appendix A, pp. 13, 25; Appendix B, p. 6; Appendix C, p. 4).

Plaintiff also repeatedly admitted that he never saw the traffic light turn red; the last time he looked, the light was yellow:

"Q. You never saw the light go to red? It was yellow?

A. No. I couldn't see on my side – I never saw because I had to go under the lights."

(Appendix A, p. 18).

"Q. And from what you've told me, sir, the last, I'm under the impression the last time you saw the color of the traffic light for you it was yellow?

A. Yes."

(Appendix A, p. 20).

"Q. Again, I'm just seeing these interrogatories that your lawyer produced.

Number ten, I ask you to describe how the accident occurred and in part, sir, you say the defendant entered the intersection on a red light and at an excessive speed striking your vehicle?

A. Right.

Q. So even though that was put down by you and your lawyer in the Answers to Interrogatories, as we sit here today I'm under the impression, again, the last time you saw the light it was yellow not red, correct?

A. That's correct . . ."

(Appendix A, p. 31). (See also Appendix B, p. 5, and Appendix C, p. 4).

Plaintiff also acknowledged that he was not aware of any witnesses to the accident or anyone who would say that Defendant was speeding or that Defendant ran the red light (Appendix A, pp. 30, 31-32, 37; Appendix B, pp. 4-6; Appendix C, pp. 4-5).

To sum up what we know from Plaintiff's own deposition, supra, here is what we have. Plaintiff's allegations of Defendant-negligence (i.e., speeding, running a red light) were effectively completely withdrawn by Plaintiff's testimony. At his deposition, Plaintiff repeatedly admitted: that, when he turned left in front of Defendant, he never even saw Defendant (Appendix A, 13, 19, 20, 25, 26, 30, 36); that he therefore could not possibly say how fast Defendant was traveling (Appendix A, 30, 36, 37); that, when he last looked at the light he was turning on, it was yellow (Appendix A, 20, 31); that he never saw the light turn red (Appendix A, 18, 31); that his allegations of Defendant-negligence were assumptions or speculation (Appendix A, 30, 36); and that he had no witnesses or evidence as to Defendant's negligence (Appendix A, 30, 31-32, 37).

I. WHERE PLAINTIFF'S ALLEGATIONS OF DEFENDANT-NEGLIGENCE WERE COMPLETELY SPECULATIVE AND WITHOUT ANY EVIDENTIARY SUPPORT, THE TRIAL COURT PROPERLY GRANTED SUMMARY DISPOSITION IN FAVOR OF DEFENDANT, AND THE COURT OF APPEALS CLEARLY ERRED IN REVERSING THAT GRANT OF SUMMARY DISPOSITION.

A. INTRODUCTION

As indicated in the statement of facts, supra, this is a third-party auto negligence action brought by Plaintiff Tomo Perkovic against Defendant Aaron Brown, seeking damages for the injuries Plaintiff alleges he suffered in the collision of the 2 parties' vehicles on November 5, 1999. Plaintiff was driving southbound on Saal Road and was in the process of making a left turn onto eastbound 19 Mile Road when his vehicle, while in the intersection, was struck by Defendant's vehicle which was proceeding northbound on Saal through the intersection. In other words, Plaintiff was struck as he turned left in front of Defendant. (Appendix E, p. 1).

In bringing this action, Plaintiff alleged that the accident was the result of Defendant's negligence. Specifically, Plaintiff accused Defendant of driving at an excessive rate of speed and running the red light at the intersection. (See, e.g., Appendix C, p. 1).

These allegations, however, turned out to be completely unsupported. Relying on Plaintiff's own deposition testimony (see Appendix A), Defendant moved for the summary-disposition dismissal of Plaintiff's action.

The trial court heard arguments on Defendant's motion and Plaintiff's answer (see Appendix B) and expressly took the matter under advisement in order to read Plaintiff's entire deposition and then issue an opinion (Appendix B, p. 9).

When the trial court issued its decision (Appendix C), the court found no evidence of Defendant's negligence, no evidence to support Plaintiff's specific allegations of Defendant negligence, and, instead, only evidence that the accident was caused by Plaintiff's own negligence. Accordingly, the trial court concluded that Defendant was not negligent and that Plaintiff was at least more than 50% responsible for his own injuries, thereby requiring dismissal of Plaintiff's action pursuant to MCR 2.116(C)(10) and MCL 500.3135(2)(b).

However, on appeal of right by Plaintiff, the Court of Appeals reversed the trial court's grant of summary disposition and remanded this case for further trial court proceedings. The Court of Appeals decided this case by "summary panel," without oral argument or full hearing, and in a unanimous, unpublished, two-page, per curiam opinion dated November 15, 2002 (Appendix E), reh den January 13, 2003 (Appendix F).

Defendant-Appellant respectfully submits, and will demonstrate infra, not only that the trial court's grant of summary disposition was clearly correct, but also that the Court of Appeals' decision is clearly erroneous, both factually and legally. This case is specifically worthy of this Court's review and relief because the Court of Appeals' opinion (Appendix E) is clearly erroneous, it is in direct conflict with decisions of this

Court and other decisions of the Court of Appeals, and it unfairly vacates a perfectly appropriate summary judgment for Defendant. MCR 7.302(B)(5).

B. STANDARD OF REVIEW

Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10) [Defendant's Motion for Summary Disposition, p. 1; Appendix C, p. 1]. However, the trial court granted the motion pursuant to MCR 2.116(C)(10) [no genuine dispute of material fact, entitlement to judgment as a matter of law] (Appendix C, p. 5). This reliance on (C)(10) was no doubt owing to the fact that the parties and the court went beyond the pleadings and relied on evidence – specifically, the deposition of Plaintiff (Appendix A). Spiek v Transportation Dept, 456 Mich 331, 338 (1998); Shirilla v Detroit, 208 Mich App 434, 436-437 (1995).

An order granting or denying summary disposition is reviewed on appeal de novo, for legal error. Maiden v Rozwood, 461 Mich 109, 118 (1999). Here, an appellate court reviews the entire trial court record to determine whether Defendant was entitled to summary disposition – i.e., judgment as a matter of law.

A (C)(10) summary disposition motion, such as the one granted by the trial court (and then "denied" by the Court of Appeals) in this case, tests the factual sufficiency of the Complaint. In deciding the motion, the trial court was required to consider the evidentiary exhibits of both parties and to consider those evidentiary submissions in the light most favorable to Plaintiff, the non-moving party. Maiden, supra, 461 Mich, at 120.

There was not much chance that this particular portion of the applicable legal standard would be violated in this case. Both parties relied on Plaintiff's deposition, excerpts from which were attached to Defendant's motion and Plaintiff's answer. When the court heard the arguments of the parties and specifically the arguments of Plaintiff's counsel which quarreled with the court's understanding of Plaintiff's deposition testimony, the court declared that it would read Plaintiff's entire deposition before deciding the motion (Appendix C, p. 9).

Another important aspect of the applicable legal standard is the burden carried by Plaintiff as the respondent to Defendant's motion. The cases are legion in support of the proposition that, in opposing a (C)(10) summary disposition motion, a responding party must present more than mere conjecture and speculation to meet its burden of establishing a genuine issue of material fact. Hall v Consolidated Rail Corp, 462 Mich 179, 187 (2000); Hampton v Waste Management, 236 Mich App 598, 605 (1999); Cloverleaf Car Co v Phillips Petroleum Co, 213 Mich App 186, 192-193 (1995); Pauley v Hall, 124 Mich App 255, 263 (1983).

In this Court's benchmark Maiden v Rozwood decision, supra, this Court announced that, due to the inconsistency of the case law, this Court was "clarify[ing] the correct legal standard under MCR 2.116(C)(10)" (461 Mich, 121). This Court held:

> "A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10). The court rule plainly requires the adverse party to set forth specific facts at the time of the motion

> showing a genuine issue for trial. . . The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules."

(461 Mich, 121).

This was precisely the problem in the instant case with Plaintiff's answer to Defendant's motion for summary disposition. As demonstrated in the statement of facts, supra, and explained infra, Plaintiff's allegations of Defendant-negligence were a matter of Plaintiff's belief, speculation, and guesswork, but they were not supported by any evidence.

C. ANALYSIS

The fundamental problem with Plaintiff's case, and the problem that correctly exposed Plaintiff's case to MCR 2.116(C)(10) summary disposition, is the inadequacy of the evidence that Plaintiff has to work with – i.e., Plaintiff's own deposition testimony (Appendix A).

In bringing the instant negligence action, Plaintiff boldly pled that Defendant was specifically negligent in driving at an excessive rate of speed and in running the red light at the accident-intersection. However, at Plaintiff's deposition, all of the clothes came completely off of these allegations.

To his credit, when testifying under oath at his deposition, Plaintiff candidly

acknowledged that his claims of Defendant speeding and running a red light were something that Plaintiff merely thought, believed, guessed, etc. Plaintiff repeatedly admitted that, although there was absolutely nothing interfering with his ability to see oncoming traffic, he never even saw Defendant's vehicle prior to the collision. Consistently, Plaintiff further acknowledged that he therefore could not say how fast Defendant was traveling. Plaintiff also repeatedly admitted that he never saw the intersection's traffic light turn red and that, while he was in process of turning left, the last time he saw the light it was yellow. [See Statement of Material Proceedings and Facts, supra, for specific transcript citations].

This means that, as admitted by Plaintiff and as noted by the trial court's opinion, Plaintiff's specific allegations of Defendant-negligence were a matter of mere conjecture and speculation, and were not supported by evidence as required (see Standard of Review, supra).

Based on Plaintiff's own testimonial admissions, the trial court properly found no evidence of Defendant's negligence.

Moreover, it was also clear that it was Plaintiff himself who was responsible for his own injury-accident. The only reasonable construction of Plaintiff's testimony was that Plaintiff turned left, on a yellow light, directly in the path of the oncoming Defendant, and without ever even seeing Defendant's vehicle.

As noted in Defendant's motion and the trial court's opinion, respectively, due to

the circumstances of the instant case, Motor Vehicle Code provisions permitted Defendant to proceed through the intersection and also required Plaintiff to yield:

> "(1) The driver of a vehicle within an intersection intending to turn to the left shall yield the right of way to a vehicle approaching from the opposite direction which is within the intersection or so close to the intersection as to constitute an immediate hazard; but the driver, having so yielded and having given a signal when and as required by this chapter, may make the left turn and the drivers of all other vehicles approaching the intersection from the opposite direction shall yield the right of way to the vehicle making the left turn. At an intersection at which a traffic signal is located, a driver intending to make a left turn shall permit vehicles bound straight through in the opposite direction which are waiting a go signal to pass through the intersection before making the turn."

MCL 257.650(1) [emphasis added].

> "(a) If the signal exhibits a green indication, vehicular traffic facing the signal, except when prohibited under section 664, may proceed straight through or turn right or left unless a sign at that place prohibits either turn. Vehicular traffic, including vehicles turning right or left, shall yield the right of way to other vehicles and to pedestrians lawfully within the intersection or an adjacent crosswalk at the time the signal is exhibited.
>
> (b) If the signal exhibits a steady yellow indication, vehicular traffic facing the signal shall stop before entering the nearest crosswalk at the intersection or at a limit line when marked, but if the stop cannot be made in safety, a vehicle may be driven cautiously through the intersection."

MCL 257.612(a), (b).

As concluded by the trial court, whether the traffic light was green (as claimed by

Defendant)[1] or yellow (as testified to by Plaintiff), Plaintiff was negligent in turning left without even seeing, let alone yielding to, Defendant's oncoming vehicle.

Both Defendant's motion and the trial court's opinion also properly took note of and applied § 3135(2)(b) of the No-Fault Act which controls the instant auto negligence action. That relatively recent statutory amendment expressly disqualifies a negligence plaintiff from recovering damages if that plaintiff is more than 50% responsible for his own injuries/damages:

> "(1) A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.
>
> (2) For a cause of action for damages pursuant to subsection (1) filed on or after 120 days after the effective date of this subsection, all of the following apply:
>
> * * *
>
> (b) Damages shall be assessed on the basis of comparative fault, except that damages shall not be assessed in favor of a party who is more than 50% at fault."

MCL 500.3135.

Since there was no evidence of Defendant's negligence, and since the evidence revealed only Plaintiff negligence, the trial court correctly granted summary disposition in

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[1] See: Defendant's Motion for Summary Disposition, p. 4; Appendix B: T. 5/21/01, 6; Appendix C, pp. 3, 5. But Defendant's testimony that conflicts with Plaintiff's doesn't count for purposes of granting C-10 summary disposition because the evidence must be construed in favor of Plaintiff, the non-moving party (see Standard of Review, supra).

favor of Defendant and correctly concluded that Plaintiff was (at least) more than 50% responsible for his own motor-vehicle-accident-injuries.

D. THE COURT OF APPEALS OPINION

On the basis of the foregoing factual and legal analysis, the Court of Appeals should have affirmed and not disturbed the trial court's accurate and detailed summary disposition opinion and order (Appendix C) in this matter.

Before dismissing Plaintiff's case, the trial court, Macomb Circuit Judge Deborah Servitto, dutifully gave Plaintiff's case very careful consideration. That is not self-serving flattery of the trial court; that is clear from the record. We know that the trial court had Defendant's summary disposition motion and Plaintiff's answer, and that the trial court heard the oral arguments of both parties at the May 21, 2001, motion hearing (Appendix B). We also know that the trial court was not satisfied with that presentation and instead took the matter under advisement, expressly committing to reading Plaintiff's entire deposition (not just the excerpts attached to the written filings) before issuing a decision (Appendix B: T. 5/21/01, 9). The trial court then decided this case (in favor of Defendant) by a 5-page written "Opinion and Order" that analyzed all of the facts in the light most favorable to Plaintiff, noting that Plaintiff's case against Defendant was based not on fact/evidence but purely on assumption or speculation (Appendix C: 7/5/01 opinion, 3, 4, 5).

However, on appeal of right by Plaintiff, the Court of Appeals reversed the trial

court's decision and remanded this case for further trial court proceedings. The Court decided this appellate case by "summary panel," without oral argument, and in a unanimous unpublished 2-page per curiam opinion dated November 15, 2002 (see Appendix E).

Defendant-Appellant respectfully submits that the Court of Appeals' opinion in this matter is clearly erroneous, both factually and legally.

The factual problem in the Court of Appeals' opinion.

There is no dispute in this 2-car-collision case that Plaintiff's southbound vehicle entered the left turn lane at a traffic-signal-protected intersection, turned left, and was immediately struck in the intersection by Defendant's oncoming northbound vehicle.

In bringing this negligence action against Defendant, Plaintiff alleged that the accident occurred because Defendant was speeding and ran into Plaintiff while the light was red.

As argued by Defendant and analyzed by the trial court, the obvious problem with Plaintiff's allegations of Defendant-negligence was that those allegations were utterly without evidentiary support.

Consistent with the standard of review applicable to C-10 summary disposition motions, Plaintiff, the non-moving party, was given the benefit of all evidentiary inferences; indeed, this case was argued and decided in the trial court on the basis of Plaintiff's deposition (see supra). Maiden v Rozwood, supra, 461 Mich, at 120-121.

As indicated in the statement of facts, supra, we know from Plaintiff's deposition (Appendix A) that Plaintiff's allegations of Defendant-negligence (speeding, running a red light) were effectively completely withdrawn by Plaintiff's testimony. At his deposition, Plaintiff candidly and repeatedly admitted: that, when he turned left in front of Defendant, he never even saw Defendant (Appendix A, 13, 19, 20, 25, 26, 30, 36); that he therefore could not possibly say how fast Defendant was traveling (Appendix A, 30, 36, 37); that, when he last looked at the light he was turning on, it was yellow (Appendix A, 20, 31); that he never saw the light turn red (Appendix A, 18, 31); that his allegations of Defendant-negligence were assumptions or speculation (Appendix A, 30, 36); and that he had no witnesses or evidence as to Defendant's negligence (Appendix A, 30, 31-32, 37).

Now, let's look at what the Court of Appeals' opinion did to these facts. Right at the beginning, on p. 1, the Court of Appeals' second paragraph seems to summarize the facts basically right – i.e., no reference to speeding or a red light:

> "Plaintiff approached an intersection on a green light and waited to make a left turn. He entered the intersection when the light was yellow, checked for oncoming traffic and, seeing none, completed the turn. He was struck by defendant, who was proceeding from the opposite direction. The court dismissed the complaint, finding that the evidence showed plaintiff was more than fifty percent at fault."

But then, all of a sudden, on p. 2, first paragraph, "evidence" of a red light erroneously creeps in, even while the Court is referring to Plaintiff's "testimony" about a "yellow" light:

> "The only evidence submitted below showed that the light was yellow or red when plaintiff made the turn.[1] Plaintiff's testimony showed that he proceeded on a yellow light when he could have stopped safely or proceeded on a red light in violation of MCL 257.612(1)(b) and (c)(i). He may have violated MCL 257.650(1) by failing to yield the right of way to an oncoming vehicle that was so close as to constitute an immediate hazard. Violation of a statute constitutes a rebuttable presumption of negligence, *Cloverleaf Car C v Phillips Petroleum Co*, 213 Mich App 186, 194; 540 NW2d 297 (1995), and thus plaintiff was partially at fault for the accident.
>
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> [1]Although defendant asserted and the trial court found that the light was still green when defendant was only thirty feet from the intersection, neither party presented any evidence to that effect."

(Emphasis added).

This is precisely where the Court of Appeals went wrong factually. THERE IS NO EVIDENCE THAT THE LIGHT WAS RED. Plaintiff basically admitted this. Defendant argued this. The trial court found this. Where did the Court of Appeals get the red light from? With no evidence of Defendant speeding and no evidence of Defendant running a red light, there is no evidence of Defendant-negligence.

As for the Court of Appeals' treatment of the evidence of a green light, it should be emphasized that that evidence was referred to three times in the trial court. It is stated, in Defendant's motion for summary disposition (at p. 4), by defense counsel at the motion hearing (Appendix B: T. 5/21/01, 6), and in the trial court's opinion (Appendix C, at pp. 3, 5), that Defendant saw the traffic light to be green when he was as close as thirty feet

from the intersection. Defendant's deposition testimony to that effect was not attached to Defendant's motion for summary disposition in deference to Plaintiff's deposition (yellow light) and the legal standard, supra, that all evidentiary inferences are to be drawn in favor of Plaintiff; but the fact that Defendant testified regarding the light being green was undisputed by Plaintiff and therefore properly before the trial court. Maiden, supra, 120-121.

The point is simple. There was evidence of a yellow light, and perhaps of a green light, but not of a red light. With or without Defendant's testimony, THERE WAS NO EVIDENCE OF A RED LIGHT.

The legal problem with the Court of Appeals' opinion.

As quoted supra, the Court of Appeals' opinion, at p. 2, agrees with Defendant and the trial court that Plaintiff was negligent.

Where the Court of Appeals parts company with the trial court's decision is with regard to Defendant's (alleged) negligence. Here is the Court of Appeals' pivotal holding supporting reversal and remand of this case:

> "Whether defendant was equally negligent cannot be determined on this record. Whether defendant also violated § 612(1)(b) cannot be determined because there is no evidence to show that he was so close to the intersection that he could not stop safely. Even though defendant had the right of way and was not required to anticipate plaintiff's negligence or to have his vehicle under such control as to be able to avoid a collision with a car coming illegally into his path, *McGuire v Rabaut*, 354 Mich 230, 234, 236; 92 NW2d 299 (1958), he was not absolved of the duty to drive with due care for the

> safety of others and was still required to exercise due care under the circumstances. *Placek v Sterling Heights*, 405 Mich 638, 669-670; 275 NW2d 511 (1979). Thus, once it became clear that plaintiff 'was going to challenge or obstruct his right-of-way,' he had a duty to try to avoid a collision. *McGuire*, *supra* at 236. Whether he was negligent in failing to do so cannot be determined due to the lack of evidence. Therefore, the trial court erred in ruling that defendant was entitled to judgment as a matter of law."

(Appendix E, at p. 2; emphasis added).

With all due respect to the Court of Appeals, that Court could not possibly have meant to say what is quoted and emphasized supra. The Court's above-quoted holding is in direct and explicit violation of the above-analyzed standard of review for C-10 summary dispositions. MCR 2.116(G)(4); Maiden, supra, 461 Mich, 120-121.

To re-cap, there is no evidence of Defendant-negligence – no evidence of speeding and no evidence of running a red light; Plaintiff submitted no evidence of Defendant-negligence and admits he has no other evidence. Defendant argued and the trial court found that there was no evidence of Defendant-negligence, as Plaintiff's allegations were just that – assumption and speculation. And now the Court of Appeals expressly agrees, supra, to "the lack of evidence" of Defendant-negligence.

The applicable standard of review required that Plaintiff respond to Defendant's C-10 allegations with actual non-speculative counter-proofs or suffer summary disposition. See, e.g., Maiden v Rozwood, supra.

The Court of Appeals' above-quoted opinion explicitly states that Defendant's

negligence "cannot be determined on this record" and "cannot be determined due to the lack of evidence." That means that Defendant wins and that the trial court was right to dismiss Plaintiff's case. The Court of Appeals was reviewing, de novo, the trial court record in this matter to see whether the trial court was right in finding no evidence of Defendant-negligence. Maiden, supra, 461 Mich, at 118. The Court of Appeals confirms the lack of evidence of Defendant-negligence but wants to give Plaintiff another chance to make another record? Even when Plaintiff has already admitted he has no other evidence?

RELIEF

For all of the foregoing reasons, Defendant-Appellant Aaron Brown requests that this Honorable Court, in lieu of granting leave to appeal, peremptorily reverse the Court of Appeals' decision (Appendices E, F) and reinstate the trial court's opinion and order (Appendix C) that granted summary disposition to Defendant.

In the alternative, Defendant requests that this Court grant leave to appeal the issue raised herein.

Respectfully submitted,

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